United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

No. 74-1035

United States Court of Appeals

FOR THE SECOND CIRCUIT

LODGES 700, 743, AND 1746
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

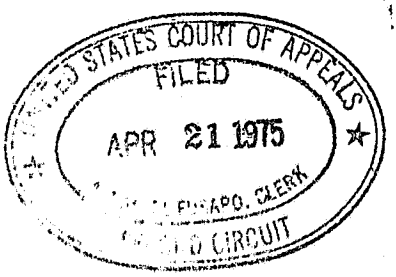
NATIONAL LABOR RELATIONS BOARD,
Respondent,

AND

UNITED AIRCRAFT CORPORATION,
Intervenor.

On Petition for Review of an Order of the National Labor Relations Board

REPLY BRIEF FOR PETITIONERS



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I. REPLY TO THE COMPANY'S BRIEF

A. The Company implies (Br., pp. 5-7, 11) that its record of post-1960 adjudicated unfair labor practices [1] should be disregarded because it is allegedly the product of a conspiracy between petitioners and the Board's "partisan"

[1] The Company cites the Board's decision in *United Aircraft Corporation*, 134 NLRB 1632, 1633, as proof that "[p]rior to 1960 the Company and the Unions enjoyed an amicable relationship extending back to 1946" (Br., p. 5). The cited passage, however, omits the massive complaint issued on the Unions' charges in Case No. 1-CA-610, which the Company chose to *settle* in 1950

General Counsel. It unsuccessfully asserted that same canard in every one of these cases; Judge Clarie and the Board rejected it *sub silentio* in Nos. 72-1936, *et al.* and 72-1935, *et al.*, now pending in this Court. See Reply Brief for Plaintiffs in No. 72-1936, pp. 31-35; Reply Brief for the Board in No. 72-1935, pp. 5-6; Reply Brief for the Charging Party before the Board in Case No. 1-CA-3355, pp. 16-28 (lodged with the Clerk in cited cases).

B. The Company tries to whitewash its record of recidivism, blandly asserting (Br., p. 6)) that "the entire course of litigation between the Parties, during this [1960-1974] period, summarized below, fails to show hostility toward employees' exercise of rights protected by the Act. . . ." The Company thereby ignores and seeks to relitigate the holdings of this Court and of the Board that its record *does* show exactly that!

In its most recent decision involving an Aircraft "non-hostile" unfair labor practice, this Court wrote:

> ". . . the Board's conclusion that section 8(a)(1) and (5) were violated was clearly correct. With regard to sections 8(a)(1) and (3), it is difficult to imagine discriminatory employer conduct more likely to discourage the exercise by employees of their rights to engage in concerted activities than the refusal to put a scheduled wage increase into effect because the employees, four days before, selected a union as bargaining representative. Thus, the Board was amply justified in con-

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rather than allowing the Board to adjudicate. In that case the Company formally *agreed* to refrain from illegal surveillance, interrogation, discriminatory transfer and discharge and refusal to bargain. See Brief for Plaintiffs-Appellants in No. 72-1936, p. 92. The passage also omits the § 8(a)(1) and (5) charges filed by Lodge 1746 on September 11, 1953 (see *Lodge 743, etc. v. United Aircraft Corp.*, 299 F. Supp. 879, 929 (1969) (Clarie, J.), which were dismissed by the Regional Director because of the Company's nondisclosure of its periodic production of data processed personnel listings which contained virtually all the information the Union was seeking. Br. for Petitioners in No. 72-1935, pp. 79-82; Reply Br. for Petitioners in No. 72-1935, pp. 46, 48.

cluding that the Company's conduct in this case was ''inherently destructive'' of important employee rights' and violative of sections 8(a)(1) and (3) without specific proof of anti-union motivation.[3] NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34.

[3] On this view of the case, we need not discuss the administrative law judge's alternative finding that the withholding was unlawfully motivated.''

NLRB v. *United Aircraft Corp., Hamilton Standard Div.*, 490 F.2d 1105, 1109-1110 (1973). Again, in *United Aircraft Corp.* v. *NLRB* [*Weil-Peterson*], 440 F.2d 85, 100 (1971), this Court found:

> ''. . . [T]he many unfair labor practices *follow a general pattern of anti-union hostility and discriminatory conduct.*'' (emphasis added).

In *Sherman,* 188 NLRB 633 (1971), the Board found that the suspension of steward Tobin ''was unlawfully motivated'' and follows a ''pattern of discrimination against union stewards * * * perpetrated by the Respondent in prior cases.''

Pursuing its theme of ''non-hostility,'' the Company mischaracterizes and trivializes the offenses which comprise its record. Thus, it describes *Weil-Peterson* as involving ''individual incidents'' of supervisor ''harass[ment]'' affecting ''fifteen employees [stewards] interspersed among five plants of the Company * * *.'' (Co. Br., p. 8). This implies that ''in the context of its sizeable employee population'' (Br., pp. 3-5)), the offenses were few and ''minor indeed.'' Indeed, the Company portrays itself as the victim of ''the laws of arithmetic'' (Br., p. 7). But it made the identical argument in those cases (Brief for Petitioners, *United Aircraft Corporation* in No. 34,342, in this Court, p. 49; Reply Brief for Petitioners, *ibid.*, p. 2), and this Court responded that the unfair labor practices were not few but ''many,'' *and* that they reflected ''a gen-

eral pattern of anti-union hostility and discriminatory conduct," p. 3, *supra*. The Court concluded:

> "Accordingly, United Aircraft's attempt to distinguish J. P. Stevens & Co. v. N.L.R.B., 380 F.2d 292 (2d Cir. 1967), where we approved an order that the company post notices in all 43 of its North and South Carolina plants when violations occurred at only 20 plants, must fail. For the same reasons, we find nothing objectionable with the provision of the Board's order broadly proscribing interference, coercion, and restraint of the workers' section 7 rights." 440 F.2d at 100.

Furthermore, in the same case, this Court answered Aircraft's claims that it had discharged stewards, not for union activities, but "in good faith" and for non-discriminatory reasons. Quotation in our opening Brief, p. 34. In addition, as this Court pointed out, in order to buttress its case against one of the discriminatees, Company investigators *altered an affidavit*. 440 F.2d, at 92.

In a further desperate effort to negate reality, the Company seeks (Br., p. 9) to create the impression that in its most recent decision this Court found that the Company had committed an unfair labor practice, *in good faith*, whereas this Court held that Aircraft's subjective motivation was irrelevant, since the conduct was blatantly discriminatory and inherently destructive of statutory rights. *NLRB* v. *United Aircraft Corp., Hamilton Standard Div.*, quoted *supra*, p. 3.

This unparalleled, stiff-necked, refusal to accept and be bound even by findings and judgments of this Court, as described, illustrates perfectly, we submit, why the pre-*Collyer* efforts of the Board and of this Court to bring the Company into compliance with the statute "* * * have not been overwhelmingly successful" (Bd. Br., p. 34). See pp. 10-12, *infra*.

C. The Company not only resorts to already discredited tactics in attempting to trivialize the violations not at issue[2] but displays its continuing blindness to the very meaning of 'hostility toward employees' exercise of rights protected by the Act,'' pp. 2-3, *supra*. Thus, the Company characterizes the violations found by Administrative Law Judge Pollack as the ''ordinary fall-out produced by normal and wholesome conflicts existing in an organized plant''; a ''few sparks,'' absence of which would ''* * * indicate * * * an employer who had abandoned its prerogative of managing the business * * *.'' (Co. Br., p. 11). And it also asserts (Br., p. 35), that ''these violations have little or no significance as a matter of federal labor law to be adjudicated by the Board * * *.'' That the Company should profess this view of ''normal and wholesome'' labor relations itself demonstrates that law enforcement efforts against the Company must be intensified rather than abandoned.

(1) The Company asserts that a foreman's anti-union diatribe and threats to discharge an employee for union activity and the spreading of a false statement that the union had forced the retirement of an older employee, are ''wholly unremarkable.'' (Co. Br., p. 32, characterizing the facts alleged in No. 74-2211; compare the statement in our Br. in that case pp. 5-9.) But the Company does not suggest how such conduct can be reconciled with respect for employees' exercise of their statutory rights and sincere acceptance of collective bargaining. As this Court knows

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[2] In addition to arguing that the violations were ''few'' in comparison with the total number of employees and ''minor'' because committed by a ''small number of low level supervisors'' (Co. Br., pp. 11, 35), the Company attempts to minimize their significance on the ground that only one involved a back pay order (Co. Br., p. 11). This Court knows, even if the Company does not, that unfair labor practices which seriously interfere with employees' freedom to engage in union activity need not necessarily involve monetary loss to the employees. See, *e.g.*, *NLRB* v. *Exchange Parts Co.*, 375 U.S. 405 (1964); *NLRB* v. *J. P. Stevens & Co.*, 464 F.2d 1326, 1335-13336 (2d Cir. 1972) (Whitener); *NLRB* v. *Crown Laundry*, *infra*, p. 11.

from experience, presence, not absence, of such respect and sincere acceptance are characteristic of normal labor relations in an "organized plant" (Co. Br., p. 11).

(2) The Company claims that its denial of briefcase passes to Union stewards (Br., pp. 18-21), is of no significance because "the employees involved were simply trying to wangle some exception to a rule published by the Company to all employees" (Br., p. 21). This disregard of the fact that carrying union briefcases in and out of the plant constitutes exercise of statutory rights illustrates the Company's continuing hostility to the philosophy of the Act. It demonstrates that the Company is still unreconciled to the idea that the Act of Congress gives *union* activity and employees engaged therein rights vis-a-vis employers which non-organizational activities simply do not have and that those rights, *pro tanto,* curtail and supersede the employer's property rights.

In *NLRB* v. *United Aircraft Corp., Pratt & Whitney Air. Div.*, 324 F.2d 128 (2 Cir. 1963), this Court sustained the Board's finding that the Company violated the Act by applying against distribution of union literature in the plant cafeteria the Company's pervasive rule against unauthorized distribution of any literature on Company property.[3] Speaking for this Court, the late Judge Clark said (324 F.2d at 131):

> "We have long passed the point where the bundle of property rights can be used arbitrarily or capriciously to restrict a worker's freedom of association or expression."

The Company's attitude toward the steward briefcase issue demonstrates that it refuses to learn that lesson. Instead of recognizing that mere non-discrimination against union activity is *not* all that the Act requires, the Company assumes that it satisfies the law by showing that

[3] See generally, *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 620-621 (1962).

its prohibitory rule applies "to all employees" and treating assertion of stewards' statutory rights as an attempt "to wangle some exception." Thus, the source of this dispute is the Company's continuing defiance of the teachings of this Court, and that is indeed a significant "matter of federal labor law."

(3) The Company betrays the persistence of its fundamental misconception that management prerogatives license discrimination in the application of its plant rules to union stewards in its treatment of the Examiner's finding that foreman Lyman discriminated against steward Gaskins with respect to non-work-related conversations (Br., pp. 21-22). The Company has the temerity to assert (Br., p. 22), that in finding that the treatment of Gaskins reflected anti-union discrimination the Trial Examiner "was on extremely tenuous ground in substituting his judgment for that of the supervisor involved * * *." It thereby betrays its contempt for statutorily authorized review of the legality of its conduct.

(4) The Company's hostility to effective exercise of the Union's statutory collective bargaining and contract policing functions is reflected in its defense of withholding information which the Company is required by the Act to produce and which could help *settle* grievances (J.A. 814). Apparently the Company considers such withholding "wholesome" and one of its "prerogatives."

The Company argues that its refusal to produce foremen's notebooks (Br., p. 29), is justified under the standard enunciated by Trial Examiner Best in *United Aircraft Corp.*, 192 NLRB 382, 423 (1971). It ignores the Board's rejection of Best's approach.[4] In the face of that reversal,

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[4] Contrary to the Company's implication (Br., p. 29), the Board disapproved Trial Examiner Best's disparaging approach to the Unions' efforts to obtain information and *rejected* his "necessarily essential or required" standard. The Board instead explicitly applied the established "relevance" test. It

the Company's reliance on Best's opinion is further proof of the Company's continuing proclivity for seizing upon any pretext, however flimsy, to justify encroachment on statutory rights, and, consequently, of the continuing necessity of Board adjudication and policing of its alleged statutory violations.

(5) As evidence of innocent motivation, the Company correctly quotes the arbitrator (Br., p. 17) as being "unconvinced" that the suspension of Sullivan constituted "illegal discrimination." But the quote is misleadingly incomplete. The arbitrator immediately thereafter added:

> "... I must say, however, that I am puzzled by the fact that Fiocchetta, Carlone and Conforto, the three Electron Beam area employees, were let off entirely when the Company disciplined Sullivan. For they seemed to me to be almost as fully implicated in what occurred as was Sullivan. While this disparate treatment of employees somewhat similarly situated may not establish discrimination, yet it tends to buttress my conclusion that Sullivan's conduct did not really merit the discipline that was imposed on him." (J.A. 771.)

Actually, the arbitrator's conclusion that the "disparate treatment * * * may not establish discrimination" demonstrates incontrovertibly that deferral of this issue to arbitration defeats the Act. For, in *Sherman*, 188 NLRB 633, see also 634-635, the Board and the Trial Examiner, following precedent based on Board experience, held that such "disparity of treatment" *does* establish respondent's "dis-

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found that the information requested by the Union appeared to be not only "relevant [but also] necessary for intelligent bargaining and for administration of existing collective bargaining contracts." *United Aircraft Corp.*, 192 NLRB 382, 389. The Board exonerated the Company solely on the ground that its pre-1960 refusals were barred by the Section 10(b) statute of limitations and its offer in *1964* to supply copies of the listings and documents on condition that the Union pay for optional deletions on which the Company insisted satisfied the Company's statutory duty. *Ibid.*, at 400. See Reply Br. for Petitioners in No. 1935, pp. 50-51.

criminatory motivation.''[5] In rejecting the Board's criterion, the arbitrator was but playing his proper role as described in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 52-54 (1974). It is precisely because the arbitrator does *not* perform the function Congress assigned to the Board that deferral to arbitration of statutory discrimination charges against this Company scuttles the Act.

D. Turning to the Company's treatment of the record, we note that it asserts on brief as fact matters as to which the record is silent or, fairly read, creates a wholly different impression from that offered by the Company. For example, the Company claims that investigator Porter questioned Sullivan about his union activities in order to ascertain whether the latter had ''come into possession of the [merit rating] cards lawfully * * * or whether the cards might have been stolen.'' (Co. Br., pp. 17-18). The Company did not proffer this fanciful excuse at the hearing.[6]

The Company asserts (Br., p. 29), that the Unions' requests for merit rating grievance information was restricted to information relied upon by the foremen and that foremen did not ''rely upon'' notebooks in rating employees. But the record in the companion case shows (our Br. in No. 74-2211, pp. 11-14), and the Company knew when it filed its brief herein, that foremen *do* rely on notebooks.[7]

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[5] The arbitrator's unwillingness to find discrimination against Sullivan further proves the validity of this Court's observation that ''if the Board had declined to entertain these claims, arbitrators deciding individual cases may never have found the general pattern of anti-union activity which is now revealed to us.'' *United Aircraft* v. *NLRB (Weil-Peterson)*, *supra*, 440 F.2d at 99. Thus, the prospect suggested in the Board's Brief, p. 35, of establishing in arbitration proceedings a ''pattern of Company disregard for employee rights'' is wholly illusory.

[6] The Company says the interrogation was ''noncoercive.'' (Co. Br., p. 17.) The Examiner rejected an offer of proof on this point (Tr. 956-957).

[7] The record supports the Examiner's findings that the Union's requests were indeed for records ''bearing on employees' performance.'' (Co. Br., p. 29). See, e.g., J.A. 106-108.

The foregoing analysis of the Company's presentation shows that the Company's attitude toward compliance with its statutory labor law obligations has *not* "matured." Its policy and attitude remain exactly what they have always been, namely, while maintaining a formal collective bargaining relationship with petitioners, to prevent, insofar as feasible, effective exercise of employees' statutory rights and effective performance of the Unions' statutory collective bargaining and contract policing functions (see Reply Brief for Petitioners in No. 72-1935, p. 14, n. 22 and accompanying text), and, when challenged, to use every available means including "after-the-fact rationalizations" (*NLRB* v. *United Aircraft Corp., Pratt & Whitney Air. Div.*, 324 F.2d 128, 129 (2 Cir. 1963)), to create litigable defenses. It is the Board's statutory obligation today, as in the past, to guard against and remedy the inevitable resulting violations, no matter how many difficulties the Company places in the way. The Company itself has thus completely undercut any tenable basis for the Board's deferral decision.

II. REPLY TO THE BOARD'S BRIEF

A. The Board responds to our contention that "what is needed is a court enforced order, followed by contempt proceedings for any future violations (Un. Br., pp. 58-59)," that "the Board could reasonably conclude that its pre-*Collyer* policies have not been overwhelmingly successful in promoting industrial peace between these parties in the past and that a new approach is warranted" (Br., p. 34). This, we submit, is an admission that the Board abandoned the path of law enforcement against its paradigm recidivist (*National Radio*, 80 LRRM at 1724, n. 16), because past enforcement efforts did not succeed in stemming the tide of violations. But "abstention" for that reason is "abdication," not "deferral" (*Banyard* v. *NLRB*, 505 F.2d 342, 348 (D.C. Cir., 1974)), and is a betrayal of the Board's duty. *National Licorice Co.* v. *Labor Board*, 309 U.S. 350, 364 (1940).

In a civilized legal system, law enforcement instrumentalities cannot bow to recidivist defiance, however determined, unyielding, ingenious and prolonged. Instead of opting for a "new approach"—actually capitulating to the same old approach the Company unsuccessfully attempted to foist upon the Board and this Court for years [8]—the Board should have intensified its determination to adjudicate every claimed violation, obtain enforcement decrees covering all forms of Company misconduct and bring contempt proceedings against the Company as soon as possible. A network of decrees, covering every surfaced facet of illegal conduct, could perhaps compel the Company to bring home to its Personnel Department and its supervision, on every level, the necessity of strict observance of employees' statutory rights and the serious consequences of nonobservance. Certain it is that only if the Company is convinced that it will confront "the swift retribution of contempt" (*NLRB* v. *Stowe Spinning Co.*, 336 U.S. 226, 235 (1949), for repetition of conduct exemplified in this case will it have an incentive to police its management corps to prevent it, and sincerely to assure its employees and the Unions that their statutory rights will hereafter be respected. No other course could possibly succeed in curbing United Aircraft's unique proclivity for unfair labor practices. Compare *NLRB* v. *Crown Laundry & Dry Cleaners, Inc.*, 437 F.2d 290 (5 Cir., 1971), discussed at p. 37 of our opening Brief.

No other course is compatible with the Board's statutory responsibilities. Congress proclaimed that "protection *by law* of the rights of employees to organize and bargain collectively * * *," promotes industrial peace, and it established the Board to promote industrial peace *by enforcing*

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[8] The Company made precisely this demand to the Board and to this Court in the *Weil-Peterson* cases; Brief for Petitioner United Aircraft Corporation in Nos. 34,342, *et al.*, pp. 49-50, Reply Brief for United Aircraft Corporation, p. 18, and to the Board in the *Sherman* case, 188 NLRB 633. *United Aircraft Corporation* v. *NLRB*, 440 F.2d 85, 99-100 (2 Cir., 1971).

those rights. National Labor Relations Act, § 1, 49 Stat. 449, as amended, § 101, 61 Stat. 136, 29 U.S.C.A. §§ 141, 151 (emphasis added). Nothing less than vigorous pursuit of the enforcement tools provided by Congress will effectuate its purpose and policy in this instance; no less should be tolerated from the Board by this Court.

Board counsel say the possibility of contempt proceedings remains (Br., pp. 34-35):

> "There are now outstanding decrees against the Company based on previous Board orders. If future acts provide clear and convincing evidence that those decrees have been violated, contempt proceedings may be instituted."

But under the Board's "deferral" approach the very unfair labor practices enjoined by those decrees are considered fodder for *arbitration*, not *litigation*. If the Board considers unfair labor practices such as those here at issue more appropriately soluble through arbitration than through Board proceedings, it would all the more opt for arbitration in preference to the far more drastic remedy of contempt. Thus, realistically, application of the *Collyer* policy relieves United Aircraft of the specter of contempt, the only one which holds any promise of making United reverse its lawless course.

B. Our reliance on the explicit exception from *Collyer* deferral policy in *National Radio* (Br., pp. 48-51), of cases where "a history of [union] animus or pattern of action subversive of Section 7 rights has been alleged" (80 LRRM at 1724), was designed to establish that the Board understood and agreed with the foregoing evaluation of its duty (Br., pp. 54-55), and that its turnabout in this case, less than one year later, was arbitrary and unreasonable and abdication (Br., pp. 48-59). Board counsel respond (Br., p. 31, n. 36), that the "cf." citation of *Sherman* in *National Radio* "did not represent a guarantee that a pre-award deferral policy would never in any circumstances be applied

to" United Aircraft and was not a "foreclosure of deferral for all time."[9]

That is pure evasion. Board counsel do not, because they cannot, deny that in the instant case both "a history of [union] animus" *and* a "pattern of action subversive of Section 7 rights *has been alleged.*" Deferral here, therefore, is necessarily repudiation and reversal of the exception stated in *National Radio*. Even in areas committed to the Board's discretion, where the Board is not prevented from changing its mind, it is not permitted to do so without an articulated explanation, from which a court can determine whether the reversal is reasonable and consistent with the Board's responsibilities. Cf. *Labor Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 442-443 (1965). Here the Board did not even acknowledge the existence of, much less give an explanation for discarding, the *National Radio* exception.

The attempt of Board's appellate counsel to redefine and limit the exception (p. 13, *supra*), of course cannot remedy that deficiency. *Labor Board* v. *Metropolitan Ins. Co.*, *supra*, at 443-444. In any event, their attempt is itself specious. Mere lapse of time or change of circumstances does not avoid the exception either as stated by the Board itself in *National Radio* or on principle. Cf. *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968), holding that until compliance with the purpose of the law has been "fully achieved," lapse of time and change of circumstances do not warrant dimishing restraint of an

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[9] Board counsel also argue (Br., n. 36, pp. 31-32), that "[s]ince *Sherman* was decided before *Collyer* it is not surprising that the Board denied the Company's motion to defer * *." But since *National Radio* was decided *after Collyer*, that is no answer at all. Board counsel would also minimize the effect of Member Brown's concurrence in *Sherman* (*ibid.*) on the theory that he relied on the "posture of the *Weil-Peterson* case, which was then pending in this Court." But if the mere pendency of *Weil-Peterson* on review was enough to produce Member Brown's concurrence in non-deferral, approval of the Board's findings and order by this Court would have required his concurrence, *a fortiori*.

offender. Besides, here there was virtually *no* lapse of time. The Board jettisoned the *National Radio* exception less than one year after it was announced, and in a case against the cited paradigm violator in which trial had concluded three months before *National Radio* was decided. And, although we contend that the Board's failure to find "a pattern of continuation of prior unfair labor practices" (Bd. Br., p. 31, quoting J.A. 845), is erroneous, *continuation* is not an element of the exception as stated by the Board in *National Radio*. Finally, never in the entire history of its defiance of the Act had it been alleged that United Aircraft refused to entertain what it considered a "grievance" under the contract, or refused to abide by an arbitrator's award. Therefore, the Board's "discovery" in this case that the Company is not inclined to dishonor "its contractual commitments dealing with procedures for dispute resolution" (Bd. Br., p. 23, quoting J.A. 845), cannot explain or justify departure from the *National Radio* exception.

Of course we do not contend, as Board counsel would have it (Br. p. 31, n. 36), that the *National Radio* exception bars deferral forever and "under all circumstances." If United Aircraft (or any other recidivist) reversed its prior course, determined to respect the statutory rights of employees and their bargaining agent, and took adequate steps to police, enforce and publicize its new policy among its supervisors and to the employees and their bargaining agent, after lapse of sufficient violation-free time, deferral of occasional "minor" unfair labor practices would not be inconsistent with the *National Radio* exception. But the Board did not find any such reversal on the part of United Aircraft, and could not have so found. Consequently, Board counsel's attempt to reconcile deferral with the *National Radio* exception must fail.

C. The Board's brief responds (pp. 31-33), much as does the Company's to our demonstration (Br., pp. 30-37), that the Board engaged in sheer *ipse dixit* when it found that the violations presently under consideration do not "show

hostility" and do not "reflect a pattern of continuation of prior unfair labor practices."[10]

Moreover, the Board's refusal (Bd. Br., p. 32, quoting A. 845), to draw an "overly hasty conclusion" that "occasional first level supervisory misconduct * * * necessarily establish[es] a disinclination on the part of Respondent to accept the reality of collective representation * * *" is an irrelevant answer to an irrelevant question. Assuming, *arguendo,* that acceptance of "the reality of collective representation" in this context means willingness of the employer's high officials to respect and abide by the law,[11] such willingness has therefore been regarded both by the Board and the courts as an utter irrelevancy. The reason is that the "test of interference, restraint and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive * * * [but on] whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *NLRB* v. *Illinois Tool Works,* 153 F.2d 811, 814 (7 Cir. 1946).

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[10] Board counsel attempt (Br., p. 23) to distinguish the relevancy of the "comparatively isolated and marginal nature of the violations alleged" in this case from the relevancy of that factor in the *Weil-Peterson* and *Sherman* cases on the ground that here the Board considered that matter as bearing on the "prospects for satisfactory dispute settlement" through contract procedures, whereas there it was considered from the perspective of "the merits." The short answer is that in the prior cases the Company pleaded, and the Board and this Court rejected, the "comparatively isolated and marginal nature of the violations" defense from three points of view: the merits, the scope of the order *and the propriety of deferral to arbitration.* As to the latter point see *United Aircraft Corporation* v. *NLRB,* 440 F.2d 85, 99-100 (2 Cir. 1971): *United Aircraft Corporation,* 188 NLRB 633, n. 1; see also the briefs for United Aircraft to this Court in the *Weil-Peterson cases,* cited p. 3, *supra.*

[11] Actually as we have seen, p. 10, *supra,* willingness "to accept the realities of collective representation" in the Board's lexicon, actually means only willingness to submit alleged unfair labor practices to arbitration and be bound by the award, see pp. 16-26, *infra.* That is a far cry from willingness to respect the statutory rights of employees and their chosen representatives. It is the latter objective which it is the Board's duty faithfully to pursue, pp. 10-12, *supra.*

The "isolated acts of minor supervisors" approach has been uniformly rejected because such "isolated" or "occasional" violations inescapably *are object lessons,* which *inevitably tend* to deter the victim and employees generally from exercising their statutory rights. In this and the companion case, for example, "occasional first-level supervisory misconduct" invariably betrayed hostility to the union activity of the stewards; that necessarily tended to deter stewards from becoming or remaining aggressive; deterred members from becoming or remaining stewards and deterred non-members from joining the union. Against a background of recidivism, of course, the effects of any "isolated" violation are magnified. These poisonous effects, which the Act is designed to eradicate, do not depend on, and are not eliminated by, absence of "a disinclination on the part of Respondent to accept the reality of collective representation," p. 15, *supra.*

Board counsel's observation (Br., p. 32), that denial of briefcase passes to union stewards "would scarcely appear to constitute a devastating blow to union activity" suggests that this aspect of the Board's en[illegible]e "maturation" theory actually turns not on demonstrated "hostility" or "continuation" of a prior "pattern," but on whether the impact of alleged unfair labor practices is apt to be "devastating." At least in the case of a recidivist like United Aircraft, that standard cannot be reconciled with the Board's statutory duty. Mere deescalation of the severity of one's transgressions cannot be allowed to purchase immunity from timely and rigorous law enforcement, for even deescalated transgressions perpetuate the employees' perception of danger and insecurity attendant upon exercise of statutory rights.

D. Board counsel concede (Br., p. 23, compare our opening Brief, pp. 49-51), that in the Board's new view the "ultimate" question is "whether the parties' agreed upon grievance and arbitration machinery can reasonably be relied on to function properly and to resolve the dispute fairly," and

that the Board found the answer to this question "in the successful processing of grievances over two of the three employee suspensions involved here, and in the Company's compliance with arbitral awards remedying those suspensions" (Br., p. 24). Logically, under this approach, the offender's record, motives and even the nature of his current unfair labor practices, no matter how "devastating," are irrelevant to the question of deferral. One of the three member majority in this case has frankly so recognized.[12] This view is inconsistent with the Board's statutory duty, as shown in our opening brief, pp. 50-58, 60-63.

In narrower terms, Board counsel's formulation of the "ultimate" question (pp. 16-17, *supra*), is a tacit admission that the Board's "maturation" finding cannot stand. For, as we have shown (Br., pp. 38-39), all of respondent's post-1960 unfair labor practices were perpetrated while respondent was as willing and anxious as it is now to process disputes over alleged statutory violations under the contractual grievance procedure and abide by arbitration awards. Thus, the evidence relied on by the Board does not support even its own claim of "maturation of the collective bargaining relationship." Actually, all that has changed is the Board's willingness to perform its statutory duty to find

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[12] In *Westinghouse Learning Corp.*, 211 NLRB No. 4, 86 LRRM 1709, 1715 (1974) (dissenting opinion), the Board unanimously found "union animus and a pattern of action subversive of Section 7 rights * * *." Member Penello dissented from the Board's issuance of a remedial order there. He stated:

> "* * * The lesson of [*Collyer* and * * *] cases [following] is that the decision to defer should not be predicated on a case-by-case historical analysis of the parties' ability to get along [sic]; rather, it rests on the existence of contractually enforceable considerations—rights and obligations—mutually agreed upon to provide a method for resolving contract disputes. As we recognized in *Collyer:* 'When the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes during the period of the contract * * * those procedures should be afforded full opportunity to function.' Thus, if, as here, the contracts in existence satisfy the requirements for deferral, the legal basis for protection of employee rights has been established and the predicate for *Collyer* deferral has been laid."

Under that theory, collective bargaining contracts providing for arbitration supersede Section 8 of the Act and, once parties so contract, they forfeit the Act's protection of statutory rights.

and remedy violations where a collective bargaining relationship allowing arbitration exists.

We submit that this Court should not sanction this administrative abdication on the theory that the Board may perform its duty on a motion for reconsideration in the event an arbitrator reaches a result *repugnant* to the Act. (*E.g.*, Bd. Br., pp. 25, 29, 34-35). For the Board's primary task is not to review arbitrators' decisions to make sure that *they* do not violate the Act,[13] but to assure that employer (and union) conduct violating the Act is remedied[14] as fully and promptly as possible and *not repeated*. See our Br., pp. 50-52, 53-54, citing authorities.[15]

E. Board counsel cite no authority for deferral of the allegation of the complaint respecting the withholding of

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[13] Cf. *United Steelworkers* v. *Enterprise Wheel and Car Co.*, 363 U.S. 593 (1960); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53 (1974).

[14] With respect to the Board's defense (Bd. Br., p. 25, n. 26) of its post-arbitration deferral of the Sullivan interrogation, which the Examiner held unlawful, we respectfully call the Court's attention to *Banyard* v. *NLRB*, 505 F.2d 342, (D.C. Cir. 1974), and *Local 715, IBEW* v. *NLRB (Malrite of Wisconsin, Inc.)*, 494 F.2d 1136, 1139 (D.C. Cir. 1974), rejecting the Board's contention that it may defer an unfair labor practice allegation not presented to an arbitrator. We rely on the reasoning and the holding in those cases. Also see pp. 20-22, *infra* and our brief in No. 74-2211, pp. 23-35.

[15] Both the Company and the Board emphasize that the Examiner recommended dismissal of several of the unfair labor practices alleged in the General Counsel's complaint. With a few exceptions, we have not asked this Court to consider those allegations in deciding whether deferral was proper. In any event, in determining whether to defer, the Board must consider the allegations of the General Counsel's complaint and the evidence submitted in support thereof; otherwise, the Board would be determining the merits preliminarily to decide whether to leave the whole matter to the arbitrator. That would be duplicative and would defeat the Board's purpose of husbanding its "limited resources" (J.A. 846). Moreover, for the Board to accept, as valid, even in determining whether or not to defer, those portions of a Trial Examiner's decision which recommended dismissal of the complaint would be to give that decision a finality to which it is not entitled under the Act. Finally, the proposition that an Examiner's recommended dismissal of some charges justifies a failure to adjudicate and remedy others which he did find is supported neither by logic nor precedent.

information from the Unions; this is necessarily so because the Board's action is unprecedented. And in arguing (Br., pp. 37-38), that the decision is not inconsistent with *American Standard, Inc.*, 203 NLRB No. 169 (1973), 83 LRRM 1245, 1246, Board counsel advance a line of analysis which is not to be found in any Board decision, compare *Labor Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 443-444.[16] Board counsel would distinguish *American Standard, Inc.* on the basis that in that case the union had not expressly reserved a contractual right to obtain the information, while in this case the union had reserved such a contractual right. That line of analysis demonstrates once again how far from Congress' intention the Board has moved, if not in *Collyer* itself, then in its subsequent "evolutionary development," see pp. 46-58, of our opening Brief. For, if the Board's decision in *American Standard* and in this case are to coexist, the result is that a union forfeits the right to obtain vindication of its statutory right to obtain information by securing contractual protection for the same right. The Board thereby subverts the decision Congress made in retaining the prior language of § 10(a):

> "* * * when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of other remedies." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 52.[17]

See *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F.2d 183, 187 (4 Cir. 1948). Our point was well made by Mr.

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[16] Despite the teaching of that case and countless others to the same effect, Board appellate counsel apparently regard the absence of reasoning in Board decisions as an opportunity and a challenge rather than a restraint.

[17] Bd. Br., p. 20, n. 20, invokes the legislative history in support of the *Collyer* deferral policy. Counsel correctly state that the Senate Report on which they rely was quoted by this Court in approving the *Collyer* policy in *Nabisco, Inc.* v. *NLRB*, 479 F.2d 770, 773 (1973). We respectfully submit that this Court was misled, because counsel opposing the Board failed to point out that the discussion in the Senate Report pertained to provisions of the Senate bill *which were not enacted into law*. Under those provisions, §§ 8(a)(6) and 8(b)(5), it was proposed that the Board would have juris-

Justice Blackmun, then sitting on the Eighth Circuit, in discussing *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 (1967), and its companion case *NLRB* v. *C & C Plywood*, 385 U.S. 421 (1967):

> "We detect in the two decisions a desire, and perhaps even a policy, on the part of the Court to give impetus to the various ways of settling labor disputes; to expedite these matters; to avoid delay either in the courts or in the arbitration process; to emphasize and protect, in cases of doubt, and to give priority to, statutorily declared rights; to regard as no more than secondary any contract interpretation aspect of what is regarded as basically an unfair labor practice dispute or as merely related to primary Board function under the Act; to take a broad, and not a narrow or technical, approach to the Act and to the multiplicity of channels available for resolving disputes; and not to close the door upon Board expertise when such restraint is clearly not violative of congressional mandate." *NLRB* v. *Huttig Sash & Door Co.*, 377 F.2d 964, 969-970 (1967).

F. Point II. B. of our argument (Un. Br. pp. 59-60), is that the Board erred in failing to adjudicate the allegations concerning Sullivan and Urbanowicz. In those cases, there was arbitration, the arbitrator found a breach of contract, the Examiner declined to find whether there was a violation of the Act, and the Board, overruling the unions' exceptions, dismissed the complaint. Since these matters

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diction to enforce labor agreements. That approach was rejected in Conference in favor of leaving the enforcement of contracts "to the usual processes of the law," namely, the courts. That is what was said at H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 41-42, I Leg. Hist. of the LMRA 545-546, also cited at Bd. Br., p. 20, n. 20. Thus, it is precisely accurate to say that the first of the two references to the legislative history relied on in the Board's brief in this case nullifies the second reference.

Even more significantly, neither reference deals with Congress' crucial decision to preserve to injured parties a "remedy" before the Board in addition to the new remedy before the courts over unfair labor practices which were also breaches of contract. *That* decision is reflected in the portion of the Conference Report quoted in the text above. In the light of *Auto Workers* v. *Scofield*, 382 U.S. 205, 218-222 (1965), it cannot even be argued that the Board is at liberty arbitrarily to defeat public or private interests Congress decided to protect, or that it is the Board, rather than the courts, which ultimately defines those interests.

were not remitted to arbitration, neither the *Collyer* decision nor this Court's approval thereof in *Nabisco* is in point, and the issue is one of first impression in this Court. The Board's total response is found at n. 26, p. 25. The problem of the Board's disposition of unfair labor practice charges where an arbitration has been held is only a small element of the present case, while it represents a major part of the companion case, No. 74-2211. Accordingly, we reserve to our brief in that case our discussion of the principle and of *IBEW, Local 715* v. *NLRB (Malrite)*, 494 F.2d 1136, 1137-1138 (D.C. Cir. 1974), cited in note 26 of the Board's brief. But even if these matters were resolved in the Board's favor, reversal of this phase of the Board's decision would be required for three reasons:

(1) It is uncontrovertible, and uncontroverted, that the Board misstated the Trial Examiner's finding when it attributed to him the view that the suspension of these employees "had been fully and successfully processed under the parties' voluntary machinery" (Un. Br. pp. 49-50 n. 49, p. 74). It is on the basis of that mistaken attribution, rather than on any independent evaluation of the record, that the Board "observed that such machinery has already effectively resolved two of the three disputed suspensions which were included in the instant complaint" (J. A. 848, quoted in part at Bd. Br., n. 26, p. 25). Moreover, not only did the Board fail to reach independently the conclusion which *it* deems relevant, we submit that it misstates the issue which it says Congress intended it to decide; namely, whether the contract machinery has already "effectively resolved" the underlying statutory violations. That issue, of course, was not before the arbitrator, and the Board is empowered to defer only with respect to matters that the arbitrator has already decided. See *Banyard* v. *NLRB*, 505 F.2d 342, 347-348 (D.C. Cir. 1974), discussed in our brief in No. 74-2211, pp. 31-32. We submit that at least where, as here, a) the violations are of a character which has an inevitable impact on the rights of employees other than the in-

dividual grievants; and b) similar violations have been previously committed by the respondent against other individuals, the arbitrator's award under the contract *cannot effectively* resolve the underlying statutory violations.

(2) Board counsel read the Board's decision as leaving open the question of an appropriate remedy for the Sullivan and Urbanowicz suspensions "in the context of the total litigation after further arbitral proceedings are completed." We doubt that this is a permissible reading of the Board's decision, for it seems to us that in this case, as in the companion case, the Board reserved jurisdiction with respect only to those incidents which *were to be* arbitrated and not those *which had been* arbitrated. But let us assume, *arguendo*, that Board counsel have correctly stated what the Board decided. On that view, the Board delayed a final determination of what the appropriate remedy is for Company actions as to which there has already been final arbitration, until there is another arbitration *with respect to other incidents*. Particularly with a recidivist employer like United Aircraft, this line of reasoning presents the prospect of an unending series of arbitrations before the Board finally determines whether or not any statutory relief is appropriate. Moreover, such delay would be a gross abuse of discretion, cf. § 6 of the Administrative Procedure Act, 80 Stat. 387, 5 U.S.C.A. § 557, because if the nature of the violations found by the arbitrator were not itself sufficient to warrant a Board remedy, then the fact that identical violations were found by the Board and this Court in the past would appear to be far more relevant than the possible outcome of additional arbitrations.[18]

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[18] Under *Collyer*, a charging party before the Board is required to exhaust contractual remedies as a condition of obtaining any consideration by the Board as to whether there should be an unfair labor practice remedy. Under the Board's decision herein, as interpreted by its counsel, the charging party must also exhaust contractual remedies with respect to *other* alleged unfair labor practices before the Board will decide whether to consider a remedy for conduct as to which there has already been an arbitration. This, then, is yet a further extension *ad absurdum* of the *Collyer* doctrine.

(3) Board counsel assert that the issue concerning the interrogation of Sullivan "like all unresolved issues, has been deferred to the contract grievance and arbitration procedure" (n. 26, p. 25 of Bd. Br.). This argument likewise seems inconsistent with what the Board said it was doing. For at J.A. 845-846, the Board describes those issues which are being deferred to arbitration, and the interrogation of Sullivan is not one of them.

Perhaps, however, Board counsel consider the interrogation of Sullivan one of the "items" with respect to which the Board assumed there may be "some question as to arbitrability." (J.A. 846, n. 5.) The difficulty is that the assumption of arguable arbitrability is utterly untenable. The contract (drafted by the Company) painstakingly enumerates, by citation of article and paragraph where deemed necessary to avoid ambiguity, the *only* issues which are arbitrable "upon the request of either party" (J.A. 515-518, 589-593, 613-616). The contract goes on to say that except for the listed issues, "no disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation or application of the provisions of [the] agreement, shall be submitted to any arbitrator for decision" (J.A. 518-519, 593, 617).

By no stretch of imagination does the interrogation of Sullivan fall within any of the listed arbitrable issues. Indeed, while Article VII, Section 3(a)1 provides for arbitration of a "grievance concerning the discharge or disciplinary suspension of an employee," thereby covering disputes arising under the *first* paragraph of Article IV (J.A. 515, 589, 613), there is no provision for arbitration of violations of the second paragraph of Article IV, which protects the right of employees "to become or remain members of the union without being subject to restraint or coercion from either the company or the union because of their exercise of this right." (J.A. 510, 585, 609). It is *not even remotely arguable,* therefore, that the violation by interrogation of

Sullivan is subject to arbitration "upon the request of either party." Cf. *International U. of E. R. & M. Wkrs.* v. *General Electric Co.*, 407 F.2d 253, 255-261 (2 Cir., 1968), cert. denied, 395 U.S. 904. For this reason alone, as we demonstrate in our brief in the companion case, pp. 22-25, the Board's decision on the Sullivan interrogation and other issues not subject to the mandatory arbitration clause must be reversed.

Assuming, however, that the Board and its counsel were not unaware of the clear unavailability of mandatory arbitration, their position comes simply to this: regardless of the nature or seriousness of the violation, and despite the absence of an even arguably applicable agreement to arbitrate, the Board will refrain from adjudicating any unfair labor practice if it involves a respondent who is willing to arbitrate and abide by arbitrators' decisions in disputes which *are* potentially arbitrable under a collective-bargaining agreement, at least if the charge is brought by this Union against this respondent. To be sure, this case and its companion are strong evidence that this is the real policy the Board is following in these cases. Nothing in *Nabisco* or any other judicial decision even remotely approves so sweeping and arbitrary an abdication as this.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Lodges 700, 743, and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO,	)	
Petitioners,	)	
v.	)	No. 74-1035
National Labor Relations Board,	)	
Respondent,	)	
and	)	
United Aircraft Corporation,	)	
Intervenor.	)	

CERTIFICATE OF SERVICE

I hereby certify that three copies of the printed Reply Brief for Petitioners in the above-captioned matter have been mailed by first class mail, postage prepaid, this 18th day of April, 1975, to:

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